SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 3 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 258

ODESSA H. KNAUFF, as Executrix of the Estate of Walter G. Knauff, Deceased; VERN E. LANTOW; COMMERCIAL SECURITY BANK, as Administrator of the Estate of Maude Carruth, Deceased; NEW PARK MINING COMPANY; EAST UTAH MINING COMPANY; and MAX J. JOHNSON, **Petitioners,**

vs.

UTAH CONSTRUCTION & MINING CO., a corporation, ROBERT L. CRANMER, ALLEN D. CHRISTENSEN, and EDMUND W. LITTLEFIELD, **Respondents.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD T. LAZEAR
LOOMIS, LAZEAR, WILSON & PICKETT
202 East 18th Street
Cheyenne, Wyoming 82001
Attorney of Record
CARL L. LATHROP
LATHROP, LATHROP & UCHNER
300 American National Bank Building
Cheyenne, Wyoming 82001
HAROLD A. FEDER
FEDER, MORRIS & KORTZ
1220 Western Federal Savings Building
Denver, Colorado 80202
GLENN C. HANNI
STRONG & HANNI
604 Boston Building
Salt Lake City, Utah 84111

Attorneys for Petitioners

EASTWOOD PRINTING CO. • 2854 LARIMER STREET • DENVER, COLORADO

INDEX

PAGE

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

POINT I Conflict in Decisions Exist Between the Tenth, Second and Seventh Circuits. 8

POINT II Substantially Identical Questions Are Involved in the Instant Case As Are Involved in Mills vs. Electric Autolite Co. (Dkt. 1133, cert. granted 4/21/69). 13

POINT III Important Questions of Federal Law Should Be Decided by This Court 15

CONCLUSION 17

APPENDICES 18

Appendix A: Circuit Court of Appeals Opinion and Judgment 18

Appendix B: District Court Findings of Fact and Conclusions of Law and Judgment 34

Appendix C: Extracts, Merger Proxy Statement.... 68

INDEX (CONTINUED)

PAGE

CITATIONS

TABLE OF CASES CITED

List vs. Fashion Park, Inc., (2 Cir., 1965) 340 F. 2d 457 9

Mills vs. Electric Autolite Co., (7 Cir., 1968) 403 F. 2d 429 ..... 8, 13

Pepper vs. Litton, (1939) 308 U.S. 295, 84 L. Ed. 281, 60 S. Ct. 238 10

SEC vs. Capital Gains Research Bureau, (1963) 375 U.S. 180, 201, 84 S. Ct. 275, 11 L. Ed. 2d 237 15

SEC vs. Texas Gulf Sulphur Co., (2 Cir., 1968) 401 F. 2d 833 ..... 8, 9, 12

STATUTES CITED

Securities Exchange Act of 1934,

Section 10(b), 15 USC § 78j (b) 3

Section 14(a), 15 USC § 78n (a) 14

Rule 10(b)-5, 17 C.F.R. 240.10(b)-5 4

28 USC 1254 (1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

ODESSA H. KNAUFF, as Executrix of the Estate of Walter G. Knauff, Deceased; VERN E. LANTOW; COMMERCIAL SECURITY BANK, as Administrator of the Estate of Maude Carruth, Deceased; NEW PARK MINING COMPANY; EAST UTAH MINING COMPANY; and MAX J. JOHNSON, **Petitioners,**

vs.

UTAH CONSTRUCTION & MINING CO., a corporation, ROBERT L. CRANMER, ALLEN D. CHRISTENSEN, and EDMUND W. LITTLEFIELD, **Respondents.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

A writ of certiorari is respectfully sought to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on March 25, 1969.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit has not been officially reported. The judgment and Opinion of the Court of Appeals for the Tenth Circuit was made and entered on March 25, 1969, and a copy is appended to this petition (Appendix A).

The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the District of Wyoming are reported in 277 F. Supp. 564 (D.C. Wyo. 1967) (Appendix B).

Jurisdiction

Jurisdiction is invoked under 28 USC 1254 (1), which statutory provision is believed to confer on this Court jurisdiction to review the judgment below.

Questions Presented For Review

Utah Construction & Mining Co. (hereinafter referred to as "Utah") was owner of 60 percent of the common stock of Lucky Mc Uranium Corporation (hereinafter referred to as "Lucky Mc") prior to Lucky Mc's merger into Utah in 1960. Petitioners represent the class of minority stockholders of Lucky Mc prior to the merger.

Petitioners contend the merger proxy statement prepared by Utah and other defendants omitted material facts or contains material misstatements in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule (10(b)-5 promulgated thereunder. Utah physically acquired its stock in Lucky Mc in 1957 and assumed complete control of Lucky Mc from that date to the date of merger. There are certain undisputed nondisclosures and misstatements which the trial court found were not "material" under said Section 10(b) and which findings the Circuit Court of Appeals for the Tenth Circuit affirmed. Matters not disclosed or misstated were generally in the following categories:

1. Personal interests of officers and directors of Utah.

2. Interlocking officers and directors of both Lucky Mc and Utah as well as the control of Lucky Mc by Utah.

3. The most substantial source of Utah's net income for two years preceding the merger was Lucky Mc.

4. Utah's reasons and purposes for merger of Lucky Mc into Utah.

The questions presented by this Petition are:

I. In a Section 10(b) action, on appellate review, are the trial court's determinations as to "materiality" of nondisclosures and misstatements binding on the Circuit Court if not found to be "clearly erroneous"?

II. Under Section 10(b), are minority stockholders to be denied a Federal remedy for material misstatements and nondisclosures in a merger proxy statement if the court finds the merger terms are "fair"?

Statutes Involved

The following statutory and regulatory provisions are involved in the within cause:

Section 10 of the Securities Exchange Act of 1934 (15 USC §78j (b)) reads as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange...

(b) To use or employ, in connection with the

purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10(b)-5, (17 C.F.R. 240. 10b-5), promulgated by the Securities Exchange Commission under Section 10(b) reads as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Statement Of The Case

This is a class action (R 1867a) brought by minority stockholders of Lucky Mc seeking to void a merger of

Lucky Mc into Utah and to impress certain properties with a constructive trust. In the alternative, petitioners seek affirmance of the merger and damages. Other relief is also claimed based on pendent jurisdiction. The trial court, sitting without a jury, held the merger was fair and gave judgment for defendants (Appendix B). The Court of Appeals for the Tenth Circuit affirmed (Appendix A).

In early 1960 Lucky Mc was merged into Utah on the basis of 10 shares of Lucky Mc stock for one share of Utah stock (R 3095-3102; 4437-40). Allen D. Christensen and Edmund W. Littlefield were the president and executive vice president of both Lucky Mc and Utah prior to merger (R 3051-2). Robert L. Cranmer was a director and secretary of Lucky Mc prior to merger (R 3497-8).

Lucky Mc was incorporated in 1954 under Nevada Law (R 4651-2). Its primary assets consisted of mining properties located near Riverton, Wyoming (R 4647). Negotiations with Utah resulted in an option agreement executed in 1955 whereby Utah could obtain 60 percent of the issued outstanding stock of Lucky Mc. In February, 1957, Utah physically acquired 60 percent of Lucky Mc stock (R 4625-40 [Ex 17]).

Under contracts with Lucky Mc, Utah constructed a uranium mill, and mined and milled the Lucky Mc ore from early 1957 to merger (R 4815-31 [Ex 32]; R 4832-54 [Ex 33]; R 4855-71 [Ex 34]). In 1959 Littlefield, a director and officer of Lucky Mc and Utah, recommended in writing to the executive committee of Utah that Lucky Mc be merged into Utah. He gave as Utah's reasons for the merger (which reasons were not disclosed in the proxy statement) the following:

1. The merger would remove the conflict of interest problem with Lucky Mc minority stockholders;

2. The merger would make available to Utah the entire cash flow of Lucky Mc without diminution, income taxes on intercompany profits, or the withholding of cash earnings in Lucky Mc;

3. The merger would place Utah stock in the hands of additional widely scattered stockholders and thus improve marketability of its stock;

4. The merger would benefit Utah because of implied recognition that it had undertaken an expansion by means other than retaining earnings (R 5845).

Littlefield on behalf of Utah negotiated a merger ratio and agreement with certain minority shareholders of Lucky Mc (R 3098-3102). Utah prepared and mailed the merger proxy statement to all Lucky Mc stockholders (R 3046-7). The proxy statement contained certain material misstatements of fact and material nondisclosures. Merger was approved by the stockholders of both companies.

Without question, certain facts were not disclosed or were misstated in the proxy statement. The trial court found these omissions and misstatements not material within the meaning of Section 10(b) and Rule 10(b)-5.

Illustrative of the nondisclosures and misstatements, in addition to those previously mentioned, are the following:

1. On page 4 of the proxy statement (R 4912 Appendix C.), where comparison is made of earnings

of Utah and its subsidiaries and affiliates with earnings of Lucky Mc, it is *not revealed* that of Utah's total combined net income in 1958 of $3,320,000 over 67 percent came from Lucky Mc. Additionally, it is *not revealed* that of Utah's total combined net income in 1959 of $7,191,000, over 41 percent came from Lucky Mc (R 4942 [Ex 42 C]; R 2192-2207).

2. The proxy statement is *silent* as to identity of Lucky Mc and Utah officers and directors, their respective stockholdings in each company (R 3069-71), and the fact that Utah controlled the Lucky Mc board (Appendix C; R 7263 [Ex D-2 pp. 140, 146-77]).

3. Utah owned a 41.25 percent interest in the equity stock and a 50 percent interest in the voting stock of Marcona Mining Corporation, an affiliate of Utah and one of its most substantial assets. Utah's stock ownership in Marcona is disclosed (Appendix C. pp. 8-9). It is *not revealed* in the proxy statement that Littlefield and Christensen (chief executive officers of both Utah and Lucky Mc) personally owned approximately 12 percent of Marcona (R 3192-3, 4175).

Reasons For Granting The Writ

This court should review the decision below for the following reasons:

1. There is a conflict in decisions of the Court of Appeals for the Tenth Circuit and the Court of Appeals for both the Second and Seventh Circuits.

2. The instant case involves substantially the same issues as are involved in a case now pending before this Court.

3. The decision of the Court of Appeals for the Tenth Circuit failed to decide important questions of Federal law which have not been, but should be, settled by this Court.

POINT I
CONFLICT IN DECISIONS EXIST BETWEEN THE TENTH, SECOND AND SEVENTH CIRCUITS.

The decision of the Tenth Circuit is squarely in conflict with the decision of the Second Circuit and the Seventh Circuit in *SEC vs. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2 Cir. 1968) and *Mills vs. Electric Autolite Co.*, 403 F.2d 429 (7 Cir. 1968) cert. granted 4/21/69 (Dkt. 1133). The Tenth Circuit in the instant case held that in determination as to "materiality" of a nondisclosed or misstated fact under Section 10(b) or Rule 10(b)-5, it was bound by the trial court's conclusion, unless on appellate review it found the trial court's conclusion was "clearly erroneous." To the contrary, the Second Circuit, sitting en banc, rejected the rule that it was bound by the "clearly erroneous" test in passing upon the trial court's determination of "materiality" of nondisclosures and misstatements. In so doing it said:

> We are *not*, of course, bound by the trial court's determination as to materiality unless we find it "clearly erroneous" for that standard of appellate review is applicable only to issues of basic fact and not to issues of ultimate fact. (Emphasis supplied.) (401 F.2d 849, footnote 11.)

In this connection, the trial court in the *Texas Gulf Sulphur* case, supra, concluded that "the results of the first drill core, K-55-1, were too remote to have had any

significant impact on the market, i.e., to be deemed material.'' (401 F.2d 849). The Second Circuit, although recognizing there was a substantial conflict in the evidence relating to the importance of this one drill core, nevertheless rejected the notion that it was bound by the ''clearly erroneous'' rule. It determined as a matter of law that the results of this core were ''material'' and should have been disclosed.

The Tenth Circuit in the instant case dealt with numerous facts urged by petitioners to be ''material.'' In most instances, it concluded that the findings of the trial court were not ''clearly erroneous'' and was thus bound by the determination of the trial court as to ''materiality.''

The Second Circuit in dealing with the standard of appellate review applicable to the trial court's determination of ''materiality,'' said:

> Our disagreement with the district judge on this issue does not, then, go to his findings of basic fact, as to which the clearly erroneous rule would apply, but to his understanding of the legal standard applicable to them. (401 F.2d 850)

The court then holds that ''knowledge of the results of the discovery hole, K-55-1, would have been important to a reasonable investor and might have affected the price of the stock'' (401 F.2d 850), citing *List vs. Fashion Park, Inc.*, 340 F.2d 457 (2nd Cir., 1965). It concluded this was ''material'' and should have been disclosed, based upon this legal standard:

> The basic test of materiality... is whether a reasonable man would attach importance... in determining his choice of action in the transaction in question.

Petitioners' position is that the Tenth Circuit should have applied the same standard of review of the determination of "materiality," as did the Second Circuit, to the following examples of nondisclosures or misstatements:

1. Utah realized profits from Lucky Mc of $2,800,000 under mining, milling and construction contracts and lease/sale of equipment and interest charges to Lucky Mc. Of Utah's total combined net income in 1958 of $3,320,000, over 67 percent came from Lucky Mc and of Utah's total combined net income in 1959 of $7,191,000, over 41 percent came from Lucky Mc (R 4942 [Ex 42 C]; R 2192-2207).

The trial court and the Tenth Circuit found the profits were fair and reasonable and therefore need not have been disclosed. The issue is not whether profits were fair and reasonable. The issue is, assuming they were fair and reasonable, should the amount and source (Lucky Mc) of the profits and earnings have been disclosed when Utah was comparing its own earnings with that of Lucky Mc in the merger proxy statement? The duty of a majority stockholder (Utah) to fully disclose all of the substantial details of its contracts with the corporation (Lucky Mc) is more important than the duty of disclosure of contracts with independent parties, *Pepper vs. Litton*, 308 U.S. 295, 84 L. Ed. 281, 60 S.Ct. 238 (1939). These disclosures were mandatory where the majority stockholder (Utah) prepared and sent out the merger proxy statement.

2. Utah owned 41.25% in the equity stock and 50% in the voting stock of Marcona Mining Corporation, an affiliate of Utah and one of its most substantial assets. On pages 8 and 9 of the proxy statement (Appendix C.) Marcona's operations, earnings and Utah's stock ownership in Marcona are disclosed.

It is not revealed anywhere in the proxy statement that Littlefield and Christensen (chief executive officers of both Utah and Lucky Mc) personally owned approximately 12 percent of Marcona (R 4175). The Tenth Circuit held the personal interest of Christensen and Littlefield need not have been disclosed as there was no evidence Utah either needed or used, before or after the merger, any funds derived from Lucky Mc for its Marcona venture.

The issue is not whether any funds derived from Lucky Mc were used directly in the Marcona venture. The question is whether the personal interests of the chief executive officers of Utah and Lucky Mc in one of Utah's most valuable affiliates was a material fact that should have been disclosed in the proxy statement. Both Littlefield and Christensen also had substantial stock interests in Utah (R 3069-71). This was not disclosed in the proxy statement and was determined by the courts below not to be a "material nondisclosure."

3. Utah's real reasons and purposes for instigating the merger were not revealed. The letter to stockholders accompanying the proxy statement (R 4908) gives three reasons for merger:

A. Lucky Mc stockholders will be able to convert their investment into a diversified company.

B. Some duplication in costs of operation and administration will be eliminated with resulting economies.

C. Consolidation of the uranium properties and interests of Utah with those of Lucky Mc will be advantageous.

The real purposes of the merger, all for Utah's benefit, are set forth in Littlefield's confidential memorandum to the Utah executive committee of May 8, 1959 (R 5845). These purposes were not revealed in the proxy statement. They were:

> A. Merger would remove the conflict of interest problem with the Lucky Mc minority stockholders;
>
> B. Merger would make available to Utah the entire cash flow of Lucky Mc without diminution for income taxes on intercompany profits, or the withholding of cash earnings in Lucky Mc;
>
> C. Merger would place Utah stock in the hands of additional widely scattered stockholders and thus improve the marketability of the Utah stock;
>
> D. Merger would benefit Utah because of implied recognition that it had undertaken an expansion by means other than retaining earnings (R 5845).

Applying the standard of review used by the Second Circuit in *SEC vs. Texas Gulf Sulphur*, supra., Utah's real reasons and purposes for the merger were clearly material and would have affected the investment judgment of a reasonable man in determining his choice of action in voting for or against the merger. This failure to disclose was violative of the statute and rule.

> 4. The proxy statement is silent as to the identity of all Lucky Mc and Utah officers and directors, as well as their respective stockholdings in each company (R 3069-71.)

Disclosure would have shown interlocking directorships and that Utah was in control of the Lucky Mc board (R 7263 [Ex. D-2 pp. 140, 146-7]). The Tenth Circuit in

effect held Utah's control of the Lucky Mc board was not "material" and did not have to be disclosed in the proxy statement. This holding is in direct conflict with the decision of the Seventh Circuit in *Mills vs Electric Autolite Co.*, 403 F. 2d 429 (1968), cert. granted 4 21 69. In the instant case, as in the Mills case, the boards of directors affirmatively recommended the merger to the minority stockholders. In the Mills case, Mergenthaler owned 54 percent of the Autolite stock and had selected Autolite's board of directors. In this case Utah owned 60 percent of Lucky Mc's stock and likewise selected Lucky Mc's board of directors. The Seventh Circuit in holding that this relationship should have been spelled out said:

> In a real sense, the merger was a bargain between Mergenthaler and the minority shareholders in Autolite. The Autolite board, selected by their adversary, presumed to advise the minority shareholders to approve the merger. The crucial question at this point, with respect to the policy of the 1934 Act, is not whether the advice was good, *but whether the minority shareholders were sufficiently alerted to the board's relationship to their adversary to be on their guard.* (Emphasis supplied.) (403 F. 2d 434)

POINT II

SUBSTANTIALLY IDENTICAL QUESTIONS ARE INVOLVED IN THE INSTANT CASE AS ARE INVOLVED IN *MILLS VS. ELECTRIC AUTOLITE CO.* (Dkt. 1133, Cert. granted 4/21/69)

In the instant case and in Mills, one of the fundamental questions involved is as follows: Are minority shareholders denied a Federal remedy for material misstatements in proxy materials violative of the Securities

Exchange Act of 1934 if the court finds that the merger terms are fair?

Both cases involve the merger of one corporation into another. In each the surviving corporation was the majority stockholder of the acquired corporation. Both involved violations of the Securities Exchange Act by misstatements or nondisclosures in proxy material sent to minority stockholders. The only distinction between the two is that Mills involved Section 14(a) and the instant action involves Section 10(b) of the Securities Exchange Act of 1934. In each case the surviving corporation controlled the board of the acquired corporation and the fact of control of the board was not disclosed. In both cases the identity of the officers and directors, as well as their respective stockholdings in each company and their interlocking relationships with the corporations were not disclosed. The proxy material in these two cases stated that the board of the acquired corporation recommended the merger to the minority stockholders. In each case all board members of the acquired corporation served at the pleasure of the surviving corporation. The merger proxy statement in each instance conveyed the impression that approval of the board was independently made. In *Mills,* 66-2/3 percent of the stockholders were required to approve the merger. In the case at bar, a 90 percent affirmative vote of the stockholders was required for approval. In *Mills,* 33-1/3 plus percent of the minority stockholders was required to prevent the merger whereas in the instant case only 10 plus percent vote of the minority stockholders was required to defeat the merger.

The factual similarities between these two cases and identity of issues with opposite results constitute cogent justification for granting certiorari in the instant case.

POINT III

IMPORTANT QUESTIONS OF FEDERAL LAW SHOULD BE DECIDED BY THIS COURT.

The Tenth Circuit failed to decide in the instant case certain important questions of Federal law which should be answered by this court.

1. What is the proper standard of appellate review as to the trial court's determination of "materiality" of nondisclosures and misstatements?

A full discussion of this question and the need for this Court to resolve the conflict existing between the circuits is fully discussed above at pages 8-13. It is manifest that this Court should resolve the conflict among the circuit courts to make uniform the proper standard of appellate review for determining what are material misstatements or nondisclosures in actions arising under Section 10(b).

2. What disclosure is required as a matter of public policy under Section 10(b) of the Securities Exchange Act of 1934?

The Seventh Circuit in attempting to determine this question looked to the pronouncement of this Court in *SEC vs. Capital Gains Research Bureau*, (1963) 375 U.S. 180, 201, 84 S.Ct. 275, 11 L. Ed. 2d 237:

> Statements in *SEC vs. Capital Gains Bureau* offer guidance here though decided under the investment advisers act of 1940. The Supreme Court said: "The statute, in recognition of the adviser's fiduciary relationship to his clients, requires that his advice be disinterested. To insure this it empowers the courts to require disclosure of material facts. It misconceives

> the purpose of that statute to confine its application to 'dishonest' as opposed to 'honest' motives... The high standards of business morality exacted by our laws regulating the securities industry do not permit an investment adviser to trade on the market effect of his own recommendations without fully and fairly revealing his personal interests in these recommendations to his clients.'' The Court cited with approval a 1936 district court holding under the '33 act ''that suppression of information material to an evaluation of the disinterestedness of investment advice 'operated as a deceit on purchasers.' 15 F. Supp., at 317.'' (*Mills vs. Electric Autolite Company*, 403 F.2d 429, 434-35.)

This Court, as it did in construing the Investment Adviser's Act, should declare the underlying policy of full disclosure required by Section 10(b) of the Securities Exchange Act of 1934 in order to bring about uniformity in disclosure requirements pertaining to securities transactions. The Tenth Circuit decision in the instant case is contrary to the policy of full disclosure announced by this Court relating to securities transactions and is not in accord with those requirements enunciated by the Seventh and Second Circuits.

Conclusion

Petitioners respectfully urge this Court to grant Certiorari for the reasons stated above.

Respectfully submitted,

EDWARD T. LAZEAR
LOOMIS, LAZEAR, WILSON & PICKETT
202 East 18th Street
Cheyenne, Wyoming 82001

Attorney of Record

CARL L. LATHROP
LATHROP, LATHROP & UCHNER
300 American National Bank Building
Cheyenne, Wyoming 82001
HAROLD A. FEDER
FEDER, MORRIS & KORTZ
1220 Western Federal Savings Building
Denver, Colorado 80202
GLENN C. HANNI
STRONG & HANNI
604 Boston Building
Salt Lake City, Utah 84111

Attorneys for Petitioners

Appendix A

Circuit Court of Appeals Opinion and Judgment

UNITED STATES COURT OF APPEALS

Tenth Circuit

No. 9921 — March Term, 1969

ODESSA H. KNAUFF, as Executrix of the Estate of Walter G. Knauff, Deceased, W. DUNCAN PYLE, VERN E. LANTOW, COMMERCIAL SECURITY BANK, as Administrator of the Estate of Maude Carruth, Deceased, NEW PARK MINING COMPANY, EAST UTAH MINING COMPANY, and MAX J. JOHNSON, *Plaintiff and Intervenors-Appellants,*

v.

UTAH CONSTRUCTION & MINING CO., a corporation, ROBERT L. CRANMER, ALLEN D. CHRISTENSEN, and EDMUND W. LITTLEFIELD,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(District Court No. 4627 Civil)

[March 25, 1969]

Carl L. Lathrop and Glen C. Hanni (Lathrop, Lathrop & Uehner, Loomis, Lazear, Wilson & Pickett, Strong & Hanni, and Feder, Morris & Feder on the brief) for Appellants.

John G. Bates (Wehrli & Williams, William J. Wehrli, Pillsbury, Madison & Sutro, and James F. Kirkham on the brief) for Appellees Utah Construction & Mining Co., Allen D. Christensen, and Edmund W. Littlefield.

F. Seaton Prince (Henderson, Godfrey & Kline, Paul B. Godfrey, Mulliner, Prince & Mangum, and Gerald R. Miller on the brief) for Appellee Robert L. Crammer.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This class action brought by a minority stockholder seeks to void a merger of two corporations and to impress certain properties with a constructive trust. In the alternative it seeks affirmance of the merger and damages because of an unfair merger ratio. Jurisdiction is invoked under § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and under 28 U.S.C. § 1655 which relates to the imposition of liens. Pendent jurisdiction is asserted over certain common law claims. The trial court, sitting without a jury, held that the merger was fair and gave judgment for the defendants. The findings of fact and conclusions of law of the trial court are reported at 377 F. Supp. 564.

The plaintiff and the intervenors were minority stockholders of Lucky Mc Uranium Corporation. In 1960, Lucky Mc and defendant Utah Construction & Mining Co. merged. Utah was the surviving corporation. The de-

fendant Robert L. Crammer was an officer and director of Lucky Mc. The defendants Christensen and Littlefield were officers and directors of both Lucky Mc and Utah.

In 1953, McNeice discovered the Lucky Mc uranium deposit near Riverton, Wyoming. Morfield and Moran associated with him in the operation of the mining claims. The three of them made a development contract with W. H. H. Crammer. In 1954, the Lucky Mc company was incorporated under Nevada law. The Lucky Mc operations were unsuccessful and by the summer of 1955 it was on the verge of failure. Negotiations with Utah resulted in an option agreement whereby Utah would obtain 60% of the Lucky Mc stock. Utah was required to explore, to secure $5,000,000 in financing and a contract with the Atomic Energy Commission, and to provide $300,000 in working capital. The option expired September 27, 1956, but Utah was unable to perform within that time and the option was extended for six months. In the extension Utah agreed to secure $10,000,000 in financing. Before February 27, 1957, Utah satisfied the conditions and received the agreed number of Lucky Mc shares.

The Utah development and operation of the Lucky Mc properties were successful. In 1959, Littlefield, a director of both Lucky Mc and Utah, proposed a merger of the two companies. A merger agreement and a merger ratio of ten Lucky Mc shares to one Utah share were negotiated by Utah and a group of Lucky Mc directors who were not directors, officers, or employees of Utah. The merger agreement and a proxy statement were sent to the shareholders of each company. Subsequently, they approved the merger and it went into effect early in 1960.

The basic claim of the minority is that the defendants

violated § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10(b)-5 promulgated thereunder, by the distribution of the merger proxy statement in which there were material nondisclosures, ommissions, (sic.) and misstatements. Joined therewith are claims based on alleged breaches of fiduciary duties which occurred before the merger negotiations.

Section 10 of the Act forbids interstate transactions which, in connection with the purchase or sale of securities, use any deceptive device which contravenes the rules and regulations of the Securities and Exchange Commission. SEC Rule 10(b)-5 provides in substance that, in connection with the purchase or sale of any security by the use of instrumentalities of interstate commerce or the mails, it is unlawful to (1) employ a scheme to defraud, (2) make an untrue statement of a material fact or omit to state a material fact, or (3) engage in any act which would defraud or deceive any person.[1]

We are not concerned with Section 14 of the Act, 15 U.S.C. § 78n, relating to proxies and proxy statements because neither the Utah nor the Lucky Mc stock was registered. Rule 10(b)-5 is directed solely at improper practices usually associated with the sale or purchase of securities and not at the fraudulent mismanagement of corporate affairs. *Birnbaum vs. Newport Steel Corp.*, 2

[1]Rule 10(b)-5 reads:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Cir., 193 F.2d 461, 464, cert. denied 343 U.S. 956. The words "purchase or sale" must be defined broadly. See *Vine vs. Beneficial Finance Company*, 2 Cir., 374 F.2d 627, 634, cert. denied 389 U.S. 970. In our opinion they include the exchange of shares which occurs as the result of a merger. See *Dasho vs. Susquehanna Corporation*, 7 Cir., 380 F.2d 262, 266, cert. denied 389 U.S. 977, and *Mader vs. Armel*, 6 Cir., 402 F.2d 158, 161.

Apparently on the theory of pendent jurisdiction, the trial court considered the premerger activities of the defendants which are alleged to violate fiduciary duties and held that no breach had occurred. This is not a derivative suit. The plaintiff and the intervenors sue in their individual capacities but they allege corporate rather than individual injuries so far as the premerger activities are concerned. Their right to maintain an action based on those activities is questionable. See *Jensen vs. Voyles*, 10 Cir., 393 F.2d 131, 133. We recognize that the law creates fiduciary duties of corporate directors to stockholders. These duties exist independently of any sale or purchase of stock of the company. The problem is whether a breach of any such duty is cognizable under Rule 10(b)-5. See *O'Neill vs. Maytag*, 2 Cir., 339 F.2d 764, 767-768. The posture of this case is such that we are unwilling to decide the point. The trouble is that the claims of the minority group relating to allegedly deceptive premerger transactions are so commingled with claims relating to the merger and its negotiation that it is difficult to satisfactorily separate them.

In the circumstances, we shall discuss all claims, whether premerger or merger, which we deem essential to a disposition of the case; and we shall do so in the light of the recognizd rule that a trial court's findings of

facts and reasonable inferences therefrom will not be set aside unless clearly erroneous. *Glens Falls Insurance Company vs. Newton Lumber & Mfg. Co.*, 10 Cir., 388 F.2d 66, 70. No discussion of burden of proof will be fruitful. The trial court heard all the evidence that any party offered and made its findings on the weight of the evidence without regard to where the burden of proof lay.

We first consider the transactions which occurred before the merger negotiations. Lucky Mc sought help from Utah for exploration and development of its uranium properties. The prime requirements were money and a contract with the AEC. Utah undertook to obtain both. It secured from banks a commitment of $10,000,000 to finance Lucky Mc. In return the banks required that Utah contract with Lucky Mc for the construction of a mill and for the mining and processing of the uranium ore. Additionally, Utah was required to give the banks "satisfactory assurance that Lucky Mc Uranium Corporation shall have a sufficient net cash accumulation to repay the loans." Utah satisfied the conditions imposed by the banks and secured the financing. It also secured a contract from AEC. In accordance with the option, Utah then received 60% of the Lucky Mc stock and placed five designees on Lucky Mc's nine-director board. With this help from Utah and with the leadership provided by Utah, Lucky Mc moved from the depths of failure to the heights of success.

Before Utah exercised the option, Lucky Mc stock was changed from a $1.00 par to a ten-cent par value. The change was in accordance with sound accounting principles to avoid an improper and arbitrary increase in the valuation of Lucky Mc assets. Utah was entitled to 60% of the stock without regard to its par value. The minority

group says that the change gave a tax advantage to Utah and a tax detriment to Lucky Mc. On substantial evidence the trial court held to the contrary. The minority argues that Utah's tax problems in part motivated the merger because Utah's settlement of an asserted deficiency raises the inference that Utah benefited from tax deductions to which Lucky Mc was entitled prior to the merger. Testimony presented by Utah established that the merger had no part in the settlement which Utah made with the Internal Revenue Service.

The minority group says that Utah overreached Lucky Mc in realizing substantial profits from various sources. The arrangement with the banks required that Utah construct the Lucky Mc mill and perform the mining and milling operations. The Utah books showed a total revenue from these contract operations of $23,750,000 and a total profit of $2,800,000, or about eleven percent. An independent public accountant of the firm which did the accounting work for Utah testified that this profit "certainly falls within the range of experience of similar businesses." The minority group points out that on its construction contracts between 1956 and 1959 Utah averaged a 3.1% profit and argues that this would be a reasonable profit on the Lucky Mc operations. The argument overlooks two factors. First is the substantial risk which Utah took in securing and, in effect, underwriting the $10,000,000 needed to finance the Lucky Mc business. Second, the usual construction operations from which Utah made the lower profit are not comparable with the work which Utah did for Lucky Mc. The finding of the trial court that the Utah profit was "reasonable and not unconscionable" is sustained by the evidence and is not clearly erroneous.

Attacks are made on isolated items which go to make

up the total profit. These include a claim of improper profit on the lease and rental of equipment. The argument is that the equipment should have been obtained under a lease purchase arrangement whereby rentals are applied on the purchase price. A witness for Utah pointed out that a lease-purchase arrangement is a credit device and that the loan agreement with the banks restricted the amount of indebtedness which Lucky Mc could incur without approval of the banks. Testimony on the appraised value of the equipment was in conflict. The trial court found that reasonable business judgment was used in the rental of the equipment and that the sale was on the basis of an independent appraisal which was adequate and proper and which was not fraudulent. These findings have record support and must stand.

The next item concerns interest. During the construction period money advanced by Utah to Lucky Mc bore interest but money paid to Utah by Lucky Mc was interest free. This resulted from the provisions in the contracts between Utah and Lucky Mc. No attack is made on those contracts. Utah also charged Lucky Mc interest on money advanced before the exercise of the option. If this was not satisfactory to Lucky Mc, the time to object was before the culmination of the option agreement. In any event the interest received by Utah was included in the gross profit made by Utah.

The minority group also says that overreaching occurred in connection with the acquisition and transfer of the Broadway and Nuclear royalty interests. On conflicting evidence, the trial court found that the transfer was at cost, that the costs were actually incurred, and that the costs were properly charged to Lucky Mc. The fact that the court credited the independent accounting

firm employed by Utah rather than the evidence of the minority group does not make its finding clearly erroneous.

The items of profits from the lease and sale of equipment, from interest charges, and from charges made on royalty acquisitions were all included within the computation of Utah's total profit. The trial court found that no overreaching occurred whether the items are considered separately or in their totality. Substantial evidence supports these findings. Not only were the transactions fair to Lucky Mc but also they had nothing to do with the purchase or sale of any security, and cannot support a claim of violation of Rule 10(b)-5. Nothing which occurred in connection with them violated any personal right of the members of the minority group.

A breach of fiduciary duty is said to have arisen from the payment of a secret commission to defendant Robert Crammer in connection with the acquisition of royalty interests in the Broadway mining properties. Crammer, an attorney, negotiated a sale of the royalty interests to Utah for his client Intermountain Petroleum and received from Intermountain a commission of $10,000. Utah later transferred the royalty interests to Lucky Mc. Crammer was on the Lucky Mc board of directors. His testimony that he revealed the commission to the Lucky Mc board is not denied. Nothing in the transaction violated any fiduciary duty. The failure to mention it in the proxy statement did not violate Rule 10(b)-5.

The proxy statement lists the principal properties of Utah and includes therein an area known as Shirley Basin. In 1957, Utah Mining Corporation, a wholly owned subsidiary of Utah, acquired mining claims in Shirley

Basin. The minority group says that this acquisition was a corporate opportunity of Lucky Mc.

Contemporaneously with the execution of the original option agreement made on September 27, 1955, between Utah and Lucky Mc, Utah entered into an agreement with the parties to the Lucky Mc venture defining the scope of that venture. It provided that all mining claims within 25 miles of the Lucky Mc mining properties should be acquired for the benefit of Lucky Mc and tendered to Lucky Mc at cost. Shirley Basin is located over a hundred miles from Lucky Mc and contains "a completely different type of ore." The speculation that Lucky Mc funds were used in Shirley Basin is without record support. The finding of the trial court that Shirley Basin belonged to Utah and was not a corporate opportunity of Lucky Mc is supported by substantial evidence. The minority group is attempting to revive a stale claim which does not belong to its members personally and which has nothing to do with the purchase or sale of a security.

We turn to matters having a direct bearing on the merger and the proxy statement. In May, 1959, Littlefield proposed to the Utah executive committee that it consider a merger of Utah and Lucky Mc on a 9 to 1 stock ratio. Christensen rejected the idea of a merger at a ratio of less than 12 to 1. Dykstra, the treasurer of Utah, was instructed to make a study of the comparative value of Utah and Lucky Mc shares. After a comprehensive analysis taking several weeks time, he came up with a ratio of 12 to 1 which he reported to Utah. During the summer of 1959, Littlefield discussed the merger with W. H. H. Cranmer, now deceased, and Robert Cranmer. They in turn discussed the subject with Moran, McNeice and Morfield who are not parties to the lawsuit and who

are substantial stockholders and directors of Lucky Mc. On September 20, 1959, Littlefield and Mecia of Utah met in Salt Lake City with W. H. H. Cranmer, McNeice, Moran and Morefield, who, together with Robert Cranmer were the major Lucky Mc minority stockholders and who were not stockholders in Utah. The Lucky Mc group proposed ratios of 7 to 1 and 8 to 1. The Utah group asserted that a 12-to 1 ratio was fair. Later in the meeting the negotiators agreed to settle on 10 to 1. This was presented to and approved by the directors of the two companies. The three Lucky Mc directors who were on the Utah board did not participate in the Lucky Mc vote of approval. Of the six remaining Lucky Mc directors, two were connected with Utah and four were not. Proxy statements were prepared and sent to the stockholders of each company. They were identical except for the covering letter.

The minority group says that the merger agreement and ratio were not reached as the result of arms-length bargaining. The argument is that the Lucky Mc group lacked the sophistication, experience, and knowledge of the Utah negotiators. We are not so persuaded. The testimony of the background of the Cranmers, Moran, and Morefield in uranium, general mining, and corporate affairs is impressive. McNeice had a personal interest in the continuity of the company which had developed his discovery. The two Cranmers, Moran, Morefield and McNeice are not complaining of the merger or the ratio even though they have a great deal more at stake than do the plaintiff and the intervenors. The Lucky Mc group succeeded in lowering the ratio from 12 to 1 to 10 to 1. We are convinced that they acted in the interest of both themselves and the other Lucky Mc minority stockholders. The minority group makes much of the fact that the final

negotiating session lasted but a short time. There is no mechanical legal requirement that a certain amount of time must be spent in such negotiations. Richland vs. Crandall, S.D.N.Y., 262 F.Supp. 538, 546-547. The Lucky Mc group had an intimate familiarity with the essential facts. The record shows that they gave honest and undivided loyalty to the minority stockholders of Lucky Mc. The trial court correctly held that the merger agreement was reached by arms-length bargaining.

The trial court found that the 10 to 1 ratio was fair, equitable, and reasonable so far as the minority stockholders of Lucky Mc and the stock holders of Utah were concerned. The evidence is conflicting. The variation runs from the 3 to 1 ratio urged by the minority group expert Kesselman to the 12 to 1 ratio found by the Utah treasurer Dykstra. McNeice, Robert Cranmer, and Moran all testified that the 10 to 1 ratio was fair. The trial court said that the merger benefited the Lucky Mc stockholders by taking them out of a speculative uranium company with a one-product business and putting them in a substantial, broad-based, and diversified company. The crucial findings of the trial court are supported by the record and are binding on us. Stevens vs. Vowell, 10 Cir., 343 F.2d 374, 377.

The minority group urges that the comparative earnings of Utah and Lucky Mc were either not disclosed or misstated in the proxy statement. The trial court resolved the controversy between the accounting experts in favor of Utah. The record contains hundreds of pages of testimony about theories of accounting, assumptions and counter-assumptions, market values, book values, comparative earnings, cash flow, dividend history, and future propects. Only a few items need be mentioned.

Certain items of Utah income from sales of land and equipment are said to be extraordinary income which was not clearly identified in the proxy statement. Utah is a diversified company which engages in general construction work, mining, land acquisition, development and sale, and other activities. The Utah experts took the position that income from the sale of equipment and land was of a recurring, rather than extraordinary nature. We believe that the position is reasonable and that the finding of the court must be accepted.

Special reference is made to the Utah holding in the Marcona complex in Peru. Littlefield and Christensen had a small personal interest in this venture. The argument is that Utah needed the Lucky Mc cash flow to finance Marcona and that the failure to disclose the personal interests is deceptive. The answer is that no evidence was produced that Utah either needed or used, either before or after the merger, any funds derived from Lucky Mc for the Marcona venture.

The minority group complains that there was no independent appraisal of the properties of the two companies and that the omission of such an appraisal from the proxy statement makes it deceptive and misleading. We know of no legal requirement that the negotiators of a merger insist upon any certain type of appraisal or valuation. The question is whether in all the circumstances the negotiators exercised reasonably prudent judgment. Richland vs. Crandall, S.D.N.Y., 262 F.Supp. 538, 547. We believe that they did.

Many pages of the record are devoted to the cash flow contributions of Lucky Mc to Utah and the claim is asserted that the proxy statement does not reveal the

facts relating thereto. The argument is unpersuasive. The minority group's expert computed the cash flow from information contained in the proxy statement and admitted that the data so obtained was more favorable to Lucky Mc than the data which he characterized as more reliable. It is self-evident that when two companies merge the survivor has the cash flow of both.

The extreme of the minority group attack is that the proxy statement does not disclose the interlocking directorate. On page 2 of that statement reference is made to the fact that the Lucky Mc directors who are Utah directors abstained from voting on the merger and that of the remaining six directors of Lucky Mc one is an officer and stockholder of Utah and the other an employee and stockholder of Utah.

Without going into further detail, we believe that the "dividend history" is not stated in a misleading manner; that Utah's share of undistributed earnings of subsidiaries and affiliates and of Lucky Mc's contributions thereto was fairly revealed; that the statement of Utah's diversification is unobjectionable; and that the reasons and purposes of the merger were adequately disclosed.

In the final analysis this is a fact case and the minority group is seeking a trial de novo in the court of appeals. The trial court found no breach of any fiduciary duty. The trial court also found that the merger agreement and ratio were fair and that the proxy statement was not defective because of material nondisclosures, omissions, or misstatements. The pertinent transactions and material facts were disclosed in sufficient detail; and absent any breach of fiduciary duty, the disclosure of additional information was not required. In our opinion

there is substantial record evidence to sustain all of the findings and they are not clearly erroneous. Accordingly, there can be no recovery by the minority group under either Rule 10(b)-5 or under any legal theories based on pendent jurisdiction.

In the circumstances, it is unnecessary to consider the questions of reliance or damages.

Affirmed.

MARCH TERM, MARCH 25th, 1969.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges.

Odessa H. Knauff, as Executrix of the Estate of Walter G. Knauff, Deceased, W. Duncan Pyle, Vern E. Lantow, Commercial Security Bank, as Administrator of the Estate of Maude Carruth, Deceased, New Park Mining Company, East Utah Mining Company, and Max J. Johnson, Plaintiff and Intervenors-Appellants,

9921 vs.

Utah Construction & Mining Co., a corporation, Robert L. Cranmer, Allen D. Christensen and Edmund W. Littlefield, Defendant-Appellees.

Appeal from the United States District Court for the District of Wyoming.

This cause came on to be heard on the transcript of

the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

William L. Whittaker, Clerk,
By Gladys E. Hobbs,
Deputy Clerk.

[SEAL]

Appendix B

District Court Conclusions and Judgment

[caption omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial before the Court on the 2nd day of May, 1967, the plaintiff and the plaintiff-intervenors, Vern E. Lantow and W. Duncan Pyle, were represented by their attoneys, Edgar J. Schoen, Carl L. Lathrop of the firm of Lathrop, Lathrop & Uehner, and Harold A. Feder of the firm of Feder, Morris & Feder; Plaintiff-intervenors, Commercial Security Bank of Ogden, Utah, Adminstrator of the Estate of Maude Carruth, deceased, New Park Mining Company, East Utah Mining Company, and Max J. Johnson were represented by their attorneys, Glenn C. Hanni of the firm of Strong & Hanni, and Edward T. Lazear of the firm of Loomis, Lazear, Wilson & Pickett. Plaintiff and plaintiff-intervenors are hereinafter referred to as plaintiffs. The defendant Robert L. Cranmer was represented by his attorney, F. Seaton Prince of the firm of Mulliner, Prince & Mangum; the defendants Utah Construction & Mining Co., Edmund W. Littlefield and Allen D. Christensen were represented by their attorneys, William J. Wehrli of the firm of Wehrli & Williams, John B. Bates, James F. Kirkham and Donald S. Zinn of the firm of Pillsbury, Madison & Sutro, and by Bruce T. Mitchell. And the Court having heard the evidence took the matter under advisement; and having considered the evidence and the written briefs submitted by the parties, and being fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action for equitable relief voiding a merger and impressing certain properties in a constructive trust for the benefit of the plaintiff and intervenors and others in their alleged class. In the alternative, it is an action affirming the contract of purchase or sale (the merger agreement) and seeking damages for the plaintiff and intervenors. Jurisdiction is invoked under the Securities Exchange Act of 1934 and Rule 10(b)-5 thereunder. 15 U.S.C. § 78(b); 17 C.F.R. 240. 10B-5. The plaintiff and intervenors also seek to impose jurisdiction under 28 U.S.C. § 1655 (proceedings to impose liens and claims against real and personal property located in the District of Wyoming). In Claim II of their Amended Complaint, the plaintiff and intervenors set forth certain allegations which they claim constitute a common law cause of action over which the Court has pendent jurisdiction.

2. Plaintiff, Odessa H. Knauff, is the duly appointed, qualified and acting executrix of the estate of Walter G. Knauff, deceased. At the time of the commencement of the within action, and at the time of his death, said decedent was a citizen of the state of Colorado.

3. Commercial Security Bank of Ogden, Utah, is the duly appointed, qualified and acting administrator of the estate of Maude Carruth, deceased. At the time of the commencement of the within action and at the time of her intervention therein, said decedent was a citizen of the State of Utah.

4. New Park Mining Company, hereinafter referred to as New Park, is a corporation organized under the laws of the State of Nevada.

5. East Utah Mining Company, hereinafter referred to as East Utah, is a corporation organized under the laws of the State of Utah.

6. Max J. Johnson is a citizen of the State of Utah.

7. Vern E. Lantow is a citizen of the State of Colorado.

8. W. Duncan Pyle is a citizen of the State of Colorado.

9. Utah Construction & Mining Co., is a corporation organized during the year 1956 under the laws of the State of Delaware which, when organized, became corporate successor to the Utah Construction Company which was organized in 1900 as a corporation under the laws of the State of Utah. Utah and its predecessor corporation both did business in the State of Wyoming. Both Utah and its predecessor corporation are hereinafter referred to as "Utah".

10. William Henry Harrison Cranmer at the time of the commencement of the within action, was a citizen of the State of New York. On May 2, 1967, he died in New York City. The Court was informed of his death on May 3, 1967. No appearance was made on behalf of the estate of William Henry Harrison Cranmer, deceased. Said estate was not served or substituted in this matter and the Court has never acquired jurisdiction over it. On the 8th day of September, 1967, Edward K. Bachman, Executor of the estate of William Henry Harrison Cranmer, deceased, was substituted as a defendant, for the said William Henry Harrison Cranmer, deceased, in the event that a re-trial of this case be ordered by an appellate court.

11. Robert L. Crammer, at the time of the commencement of the within action, was a citizen of either the State of Nevada or the State of Utah and now resides in the State of California.

12. Allen D. Christensen, hereinafter referred to as Christensen, is a citizen of the State of California.

13. Edmund W. Littlefield, hereinafter referred to as Littlefield, is a citizen of the State of California.

14. On or about September 13, 1953, Neil E. McNeice discovered the Lucky Mc uranium property in the Gas Hills District near Riverton, Wyoming. He became associated with other residents of Wyoming in order to stake and develop the Lucky Mc claims. This Lucky Mc Group included Neil E. McNeice, Lowell A. Morfeld, and R. Lauren Moran. On May 18, 1954, the Lucky Mc Group entered into an agreement with William Henry Harrison Crammer and his associates to develop the Lucky Mc properties.

15. In 1954, plaintiff Max Johnson put the original developers of the Lucky Mc properties into contact with Mr. W. H. H. Crammer, president of New Park. For this service Mr. Johnson received 40,000 shares of stock in Lucky Mc.

16. In the initial negotiations with the original Lucky Mc developers, New Park was to take over the operation of the Lucky Mc property as a mine, with the ore to be sold to the Government. It soon became apparent, however, that a mill to produce uranium oxide concentrate would be necessary to develop the Lucky Mc properties. New Park could not undertake such a large

project. Therefore, in 1954 a new corporation, Lucky Mc Uranium Corporation, was formed with W. H. H. Cranmer as president and with New Park and other corporations and persons as financial contributors. Lucky Mc Uranium Corporation, hereinafter called Lucky Mc, was organized under the laws of the State of Nevada and was doing business in the State of Wyoming from 1954 to 1960. In early 1960, it merged with Utah Construction & Mining Co.

17. The original Lucky Mc developers relied upon the ability and integrity of W. H. H. Cranmer personally and required that he have a substantial personal participation in the Lucky Mc venture. They did not rely on New Park or any of the other corporations who were investing in the Lucky Mc corporation.

18. W. H. H. Cranmer was president and director of Lucky Mc until February 1957, and was an officer and director of Lucky Mc from February 1957, through the time of its merger with Utah. His son, Robert L. Cranmer, was an officer and director of Lucky Mc from its inception through the time of its merger with Utah. Under the Cranmers, the Lucky Mc property was mined. The Cranmers made every effort to develop the property and to interest others in developing it so that an AEC contract could be obtained and a uranium processing mill could be built. Many potential investors were brought to look at the property, but none became interested in developing it.

19. By midsummer of 1955, Lucky Mc had a small open-pit mine and had been attempting without success to develop a uranium mining and milling operation and to obtain an AEC contract for the purchase of uranium oxide concentrate. It had been unable to negotiate a

suitable deal with any capable companies and was on the verge of failure. Its mining operations had been unsuccessful. It had little or no cash with which to operate. After unsuccessful attempts to interest other companies in undertaking the development of the Lucky Mc properties, it contacted Utah to interest it in developing the Lucky Mc properties.

20. After investigating the Lucky Mc properties, Utah entered into an option agreement with Lucky Mc dated September 27, 1955. The agreement provided that Utah could obtain 60 per cent of the outstanding stock of Lucky Mc upon the performance of certain acts, including the following: (a) exploration; (b) securing of financing in the amount of $5,000,000: (c) securing an AEC contract; and (d) providing working capital in a sum not to exceed $300,000, less the amounts actually expended for exploration.

21. In a companion agreement also entered into on September 27, 1955, Utah and the Lucky Mc shareholders agreed that all claims or other interests within 25 miles of Lucky Mc acquired by any of the principal Lucky Mc shareholders and option holders must be offered to Lucky Mc at cost. Under the terms of that agreement the extent of the Lucky Mc venture was defined and potential problems of conflict of interest between the parties with respect to other mining ventures were disposed of or resolved. Pursuant to this contract, Utah prospected, acquired and turned over to Lucky Mc at cost properties containing approximately two-thirds of the uranium reserves which Lucky Mc had at the time of the merger.

22. The original contract was for six months with an option to extend it for another six months to Septem-

ber 27, 1956. Utah was unable to complete the financing and obtain the AEC contract by September 27, 1956. An additional $5,000,000 in financing for a total of $10,000,000 was required; Utah undertook to obtain and did obtain that extra $5,000,000 financing without further cost to the Lucky Mc shareholders or any dilution of their equity. In consideration thereof and in order to give sufficient time to negotiate the AEC contract and complete the additional financing, the option agreement was extended to March 1957.

23. Utah performed everything it was required to do under its contract with Lucky Mc; the financing arrangements were completed, and the AEC contract was executed. On February 27, 1957, Utah exercised its option, took possession of the shares representing its 60 per cent interest in Lucky Mc, and placed five of its men on a nine-man board of directors of Lucky Mc. The other four directors were W. H. H. Crammer, Robert L. Crammer, Lowell A. Morfeld and Neil McNeice.

24. Prior to February 27, 1957, when Utah exercised its option and took possession of its Lucky Mc shares, Lucky Mc changed the par value of its shares from $1 to ten cents pursuant to the request by Utah and upon advice of W. H. H. Crammer's independent counsel and Lucky Mc's independent certified public accountants, so that the shares issued pursuant to the option agreement could be accounted for by both Utah and Lucky Mc in accordance with proper and sound accounting principles. The change did not affect any shareholders' equity interest, and could not affect any tax liability of Utah upon the exercise of its option. The change in par was not concealed from the Lucky Mc shareholders; the question of such change was presented by W. H. H. Crammer, president of Lucky Mc,

to the Lucky Mc stockholders, and on February 21, 1957, at a special meeting of the stockholders, the change in par value was approved. On February 27, 1957, an explanation of the change of par was sent to all Lucky Mc shareholders along with the opinion of Lucky Mc's independent certified public accountants concerning the change.

25. The exercise of the option by Utah was properly set up on the books of Utah and Lucky Mc showing that Lucky Mc issued 3,638,748 shares of its stock to Utah for a cost to Utah of $363,875.

26. In order to obtain the necessary $10,000,000 financing, the banks that extended the $10,000,000 credit required Utah to do the mining, the milling and the construction work; they required Utah to enter into contracts with Lucky Mc whereby Utah would guarantee maximum costs for mining, milling and construction and guarantee the presence of sufficient uranium ore in the ground. In other words, Utah was required to guarantee that Lucky Mc would pay off the $10,000,000 loan from the difference between the price paid by the AEC for uranium oxide concentrates and the maximum cost for mining, milling and construction guaranteed by Utah. In making its guarantees to the bank to do the mining, milling and construction work for Lucky Mc, Utah assumed substantial risks.

27. As soon as the Lucky Mc mill was constructed and had been in operation a sufficient length of time to give actual cost data, Utah requested and received permission from the banks that the contracts be amended to reduce substantially the cost of mining and milling to Lucky Mc. The original contracts were reviewed with and approved by the board of directors of Lucky Mc prior to the time Utah finally exercised its option and placed

its men on the board of Lucky Mc. These amendments substantially increased the profits to the Lucky Mc shareholders, but because of tax benefits, they represented a small sacrifice on the part of Utah. The mill having already been constructed, the construction contract was not changed.

28. The Lucky Mc mill began operations February 28, 1958; the contracts were amended as of June 1, 1958, just slightly more than three months after the mill came into operation. In connection with the amendments of the contracts, construction equipment which Lucky Mc had been renting from Utah was sold to Lucky Mc at a sales price which was established by an independent appraisal.

29. The total profit made by Utah upon mining, milling and construction, including interest charges and profit on the rental and sale of equipment, was just over 10 per cent before taxes. This percentage of profit does not include overhead expenses of the parent company. The quality of Utah's mining, milling and construction work was outstanding. The total profit Utah made was reasonable and not unconscionable.

30. In May of 1959, Mr. Littlefield proposed to the executive committee of Utah that it consider a merger with Lucky Mc. The executive committee was composed of Allen D. Christensen, Marriner Eccles and Edmund W. Littlefield. Mr. Littlefield suggested the ratio of nine shares of Lucky Mc stock to one share of Utah stock. The executive committee was receptive to the idea of merger, but rejected as unfair to Utah the ratio of 9 to 1. Mr. Christensen rejected the idea of any merger at a ratio of less than 12 to 1.

31. Mr. Littlefield instructed the treasurer of the company, Mr. Orville L. Dykstra, to make a study of what a fair merger ratio should be, that is, to make a reasonable valuation of the comparative values of shares of stock in Utah and Lucky Mc. Mr. Dykstra began his study in mid-June 1959; it was in three parts, which were completed and submitted to Mr. Littlefield on June 17, July 22 and July 23, 1959, respectively. In performing his study, Mr. Dykstra acted in good faith; he was not advised that Mr. Littlefield had recommended a ratio of 9 to 1, nor of its rejection by the other members of the executive committee, nor the statement of Mr. Christensen that the ratio should be no less than 12 to 1.

32. Tapping the experience of the heads of the various departments within Utah to appraise the worth of the particular portions of Utah's operations for which they were responsible, and using three separate approaches to arrive at his evaluation, Mr. Dykstra concluded that the ratio should be no more favorable to Lucky Mc than twelve shares of Lucky Mc to one share of Utah stock.

33. Mr. Dykstra explained his conclusions to Mr. Littlefield, who submitted them to the Utah board of directors. They indicated that they would accept a 12 to 1 merger ratio.

34. During the summer while Mr. Dykstra was preparing his evaluation studies, Mr. Littlefield approached Mr. Moran and W. H. H. Crammer with the subject of merger, but he did not mention a specific merger ratio. He gave to W. H. H. Crammer, on behalf of the minority shareholders, charts setting out financial data of Utah and Lucky Mc. The Lucky Mc shareholders recognized the desirability of a merger with Utah and they began

investigating the facts to determine what a fair merger ratio should be. Those shareholders, including W. H. H. Cranmer, Robert Cranmer, Mr. Moran, Mr. McNeice and Mr. Morfeld, met among themselves on several occasions to discuss the merger ratio.

35. On September 20, 1959, Mr. Littlefield and Mr. Mecia of Utah met with the major Lucky Mc minority shareholders for an all-day bargaining session. Mr. McNeice, Mr. Morfeld, Mr. Moran, Mr. W. H. H. Cranmer and, for part of the time, Robert Cranmer, were present at that meeting. Answering questions by the Lucky Mc shareholders concerning Utah, Mr. Littlefield gave them all the information that they sought concerning Utah and Lucky Mc. During the course of these discussions, the original Lucky Mc shareholders proposed ratios of 7 to 1 and 8 to 1; The representatives of Utah proposed a 12 to 1 ratio. The confidential report of Mr. Dykstra to top Utah management had said that a 12 to 1 ratio was fair. After the original Lucky Mc shareholders withdrew and held a caucus they proposed a merger ratio of 10 to 1 which Mr. Littlefield persuaded the board of directors to accept.

36. The original Lucky Mc shareholders as a group were completely familiar with the operation of Lucky Mc and were experienced in mining ventures in general and the uranium industry in particular. That group consisted of W. H. H. Cranmer, Robert L. Cranmer, Neil E. McNeice, Lowell A. Morfeld and R. Lauren Moran, Esq. They were stockholders of Lucky Mc. They were not stockholders of Utah and they were independent of Utah. The bargaining between the representatives of Utah and the original Lucky Mc shareholders was carried on at arm's length.

37. The original Lucky Mc group, McNeice, Morfeld, and Moran, did not join in this lawsuit although they had the most to gain. The stockholdings of the original Lucky Mc shareholders and their families at the time of the merger were as follows:

	Shares
Robert L. Crammer	27,441
Robert L. Crammer and Claire C. Crammer	19,700
Robert L. Crammer, as custodian for Anthony Rhoades Duke	600
Robert L. Crammer, as custodian for Catherine Wood Crammer	2,450
Robert L. Crammer, as custodian for Lillian Claire Crammer	2,450
Robert L. Crammer, as custodian for Olive Crammer Duke	600
Robert L. Crammer, as custodian for Loring Castleton Crammer	2,450
Robert L. Crammer, as custodian for Thomas L. Crammer	3,050
Robert L. Crammer, as custodian for William Robert Castleton Crammer	2,450
Robert L. Crammer, as custodian for William H. H. Crammer IV	3,050
Robert L. Crammer, as trustee for Mrs. Virginia Lambert Johnson	600
Robert L. Crammer, as custodian for Lane C. Wille	600
W. H. H. Crammer	130,700
Neil E. McNeice and H. Maxine McNeice	271,000
R. Lauren Moran	32,000
R. Lauren Moran, custodian for Roberta Marilyn Moran	1,000

	Shares
Lowell A. Morfeld and Frances Mary Morfeld and Debby Frances Morfeld	1,000
Lowell A. Morfeld and Frances Mary Morfeld and Sharon Kay Morfeld	1,000
Lowell A. Morfeld and Frances Mary Morfeld and Terry Lowell Morfeld	1,000
Lowell A. Morfeld	166,100

38. W. H. H. Cranmer, Robert L. Cranmer, Mc Neice, Morfeld and Moran bargained on behalf of themselves and the other minority stockholders of Lucky Mc at arm's length with Edmund W. Littlefield, who represented Utah; they took into consideration relative market values, earnings, book values, dividend history and prospects concerning Lucky Mc and Utah. They concluded that the ratio of 10 to 1 was fair and adequate.

39. The merger ratio of 10 shares of Lucky Mc to one share of Utah was fair, equitable and reasonable to the minority stockholders of Lucky Mc and to the stockholders of Utah.

40. On or about December 18, 1959, a merger agreement was drawn up. The merger agreement and the proxy statement dated January 5, 1960, describing the two companies and their financial data were sent to the shareholders of Lucky Mc and Utah.

41. The merger statement consists of 31 pages and in addition contains a cover letter incorporated as part of the printed statement. The proxy statement sent to the shareholders of Lucky Mc and Utah was identical except for the covering letter. The proxy statement contained

a description of the proposed merger, a description of Utah and Lucky Mc with financial data for both companies, and a history of the dealings between Lucky Mc and Utah. In addition, it contained accounting statements for both companies prepared by their respective independent certified public accountants, a copy of the merger agreement, and extracts from the law of the States of Delaware and Nevada relating to the rights of dissenting stockholders of Lucky Mc and Utah respectively.

42. The proxy statement was prepared by Utah management and reviewed by Lucky Mc management. It was signed by Robert L. Cranmer in his official capacity of Secretary of Lucky Mc Uranium Corporation, in good faith, believing the truth of the matters and things stated therein. The financial statements in the proxy statement were prepared by independent certified public accountants for Utah and for Lucky Mc and all the financial data was prepared in consultation with those accountants. The entire proxy statement was reviewed by Utah's independent legal counsel which advised that the proxy statement was adequate and proper. All the information necessary for an informed decision concerning the proposed merger was set forth in the proxy statement.

43. The merger was thereafter approved by the Lucky Mc shareholders. 5,214,517 shares voted in favor of the merger and 66,968 voted against it. On January 29, 1960, the merger between Utah and Lucky Mc was approved by the shareholders of both corporations.

44. The matters and things contained in the proxy statement are true and are adequately set forth so as not to be misleading in any material aspect. The proxy statement contained no misstatements of material fact. It did

not omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The findings herein that statements are not false or misleading includes the finding that such statements did not contain any untrue statement of a material fact and did not omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

45. The covering letter from Robert L. Cranmer to the stockholders of Lucky Mc dated January 5, 1960, which forms the cover of the proxy statement sent to the Lucky Mc shareholders is not false or misleading, and it accurately and sufficiently sets forth reasons why the merger was advisable.

46. The proxy statement did not have to state expressly that one of the reasons for the merger was to eliminate possible conflicts of interest by removing any problems with the minority shareholders. It was sufficient to set forth the elimination of conflicts and problems with the minority shareholders in paragraphs A, B, and C on the cover page of the proxy statement.

47. It is the necessary result of any merger that the entire cash flow from any one of the predecessor companies will be available to the surviving company. The cash flow generated by Lucky Mc is set forth in the proxy statement. It was not false or misleading to omit from the proxy statement an express statement that this cash flow would be available to the surviving company; this result would necessarily follow the merger.

48. It was not necessary nor required that a state-

ment pertaining to increasing the marketability of Utah stock through the acquisition of widely scattered stockholders be expressly set forth in the merger proxy statement. If that were a purpose of Utah for the merger, it is not material to Lucky Mc shareholders, nor is it relevant to the advisability of merger or the fairness of the merger ratio. The proxy statement was not false or misleading in failing to set forth that alleged purpose.

49. It was not a purpose of the merger that Utah desperately needed the cash flow of Lucky Mc in order to develop its other properties, in particular, the Marcona complex, and the proxy statement was not false or misleading in failing to set forth such alleged purpose for the merger.

50. At the time of the merger Utah believed there would be no tax liability to it or tax benefit to Lucky Mc arising out of the exercise of the option. There was no bad faith in Utah's tax treatment of the option. It was not a purpose of Utah to offset any tax liability of Utah arising out of the exercise of its option in February 1957 to acquire a 60 per cent interest in Lucky Mc against tax benefits accruing to Lucky Mc. The proxy statement was not false or misleading in failing to set forth such alleged purpose.

51. Plaintiffs submitted no evidence that proved that the portions of the proxy statement entitled "Notice of Special Meeting of Stockholders to be held January 29, 1960", "Proxy Statement for Special Meeting of Stockholders—January 29, 1960", and "Action to be taken at the Meeting" (proxy statement, pp. 1-2) are false and misleading. Those portions of the proxy statement are not false or misleading.

52. The portion of the merger proxy statement entitled "Basis of Merger" (proxy statement, p. 2) is not false or misleading. As stated in that section, the rate of exchange (merger ratio) was determined by arm's length bargaining between the management of Utah and the principal stockholders of Lucky Mc.

53. Plaintiffs submitted no evidence that showed that the sections of the proxy statement entitled "Effectiveness of Merger", "Abandonment of Merger" and "Capitalization" (proxy statement, pp. 2-3) are false or misleading. Those sections are not false or misleading.

54. The section of the proxy statement entitled "Earnings" (proxy statement, pp. 3-4), including the presentation of the figures on page 4 of the proxy statement, is not false or misleading. This portion of the proxy statement contains four subsections: The first two concern Utah and fully and fairly gave the financial picture of its operations for the years 1955 through 1959, as shown therein. That financial picture is properly presented as "Gross revenue from operations", plus "other income", less "Costs and Expenses", and "Provision for Federal income taxes" from which is derived a "Net income" and a "Net income" per share. To that net income is added, "Utah's equity in undistributed earnings of subsidiary and affiliated companies" to derive a "Combined net income" and an "Amount per share". The third subsection fully and fairly sets forth the financial picture of Lucky Mc. It shows Lucky Mc's "Gross Sales", less "Costs and expenses", and "Provision for Federal income taxes". Also shown is the Net income and the Net income per share. The fourth subsection is a pro forma combined presentation showing what Lucky Mc would have

contributed to Utah during the years in question had the two companies been merged.

55. The figures on page 4 of the proxy statement and those contained in the Lucky Mc statement of income and retained earnings at page 22 of the proxy statement fully set forth the cash flow generated by Lucky Mc and the contribution of Lucky Mc's cash flow would make to Utah if the two companies were merged.

56. The Utah financial data includes under "Gross income from operations" the revenue from the sale of industrial land in South San Francisco and includes under "Other income" the revenue from the sale of construction equipment to Lucky Mc, and the revenue from the sale of land to the Highway Department of the State of Utah and from the liquidation of housing subsidiaries; those revenues do not fall within a special category known as "extraordinary items" for accounting purposes and need not have been set forth in a different manner than contained in the proxy statement.

57. The revenues itemized in Paragraph 56, supra, are not "Extraordinary" in the light of Utah's operations: Utah sells construction equipment as part of its regular course of business and sells land as part of its regular course of business; Utah's profits from such sales can be expected to continue and have continued and reoccurred regularly from year to year. Profits from such sources are less fluctuating from year to year than are Utah's profits from construction.

58. The profit from the sale of the South San Francisco land was properly included under the heading "Gross revenue from operations" (proxy statement, p.

4). The sale of land to the State of Utah, the sale of equipment to Lucky Mc and the gain on the liquidation of housing development corporations were properly included in a separate category entitled "Other income"; the statement on page 4 is a summary of the more detailed statement on page 19 of the proxy statement. The proxy statement is not false or misleading in the manner in which it presents these items of revenue.

59. In 1958, Utah received a dividend from its subsidiary, Cia San Juan, in an amount of $825,050. In 1959, Utah returned that money to Cia San Juan in the form of a loan in the amount of $825,000. The purpose of this transaction was to save approximately $400,000 in taxes; the transaction was not intended to mislead the Lucky Mc shareholders. The dividend from Cia San Juan did not distort the financial picture of Utah. As a dividend received, it was properly included within the heading "Other income", on page 4 of the proxy statement, and under the separate heading, "Dividends from subsidiaries and affiliates" contained in the financial statement on page 19 of the proxy statement. If that sum had not appeared under the heading "Other income", then it would have appeared under the heading, "Utah's equity in undistributed earnings of subsidiary and affiliated companies", also set forth on page 4 of the proxy statement. The combined net income for Utah would have been the same except for such adjustment, if any, to reflect the tax savings which inspired the dividend. The proxy statement was not false or misleading in failing specifically to describe the dividend from Cia San Juan.

60. The paragraph entitled "Book Values" (proxy statement, p. 4) is not false or misleading.

61. The section entitled "Dividends" is not false or misleading. The information concerning Lucky Mc's restrictions from paying dividends under its bank loan agreements is set forth in the section entitled "Description of Capital Stock of Utah and Lucky Mc" at page 13 of the proxy statement, which describes the loan restrictions applicable to both companies. That information is again set forth in the balance sheet at page 21 of the proxy statement. Page 6 of the proxy statement states that the total revenue to Lucky Mc under the new contract with the AEC will exceed $100,000,000 and also states that the bank loan is anticipated to be retired before the end of the 1960 fiscal year. The earnings per share for 1958 and 1959 are set forth on page 4 of the proxy statement. The proxy statement gives sufficient information with respect to the potential dividend capabilities of Lucky Mc, and is not false or misleading in this regard.

62. No evidence shows that the section entitled "Market Prices" (proxy statement, p. 5) was false or misleading. That section is not false or misleading.

63. The section of the proxy statement entitled "History, Business and Properties of Lucky Mc" (proxy statement, pp. 5-7) is not false or misleading. That section accurately describes what Utah was required to do to fulfill its obligations under the option agreement between Lucky Mc and Utah entered into in September 1955. As stated in that section, the option under the agreement of September 1955, was exercised in February 1957. If the option were exercised in September of 1956, and again in February of 1957, it would have made no material difference so far as the proxy statement is concerned, and the omission of the September 1956 date from the proxy statement is not material and is not false or misleading.

64. The section entitled "History, Business and Properties of Lucky Mc" describes also the fact that Utah constructed the mill and related facilities for a cost of approximately $7,500,000 and was doing milling and mining work at a cost plus a percentage fee. Utah's purpose in amending the mining and milling contracts was not to obtain $290,000 in mining costs which it could have collected under the terms of the original contracts. The proxy statement was not false or misleading when it did not state that the original contracts were amended and that the recoupment of $290,000 in mining costs was a reason for that amendment.

65. In connection with the amendment to the mining and milling contract, Lucky Mc purchased from Utah equipment that it had been leasing from Utah. The equipment was sold at a price established by an independent appraisal. Such appraisal was not inadequate nor improperly done, nor was it a deliberate fraud practiced by Utah upon Lucky Mc. The proxy statement was not false or misleading when it did not contain the information concerning the sale of the equipment to Lucky Mc.

66. Lucky Mc exercised reasonable business judgment in renting its equipment from Utah; the restrictions in its loan agreement may have precluded Lucky Mc from making lease purchase arrangements for the purchase of its equipment. The proxy statement was not false or misleading in this connection.

67. The profit received by Utah for its work performed for Lucky Mc was not unreasonable. Utah did not overreach Lucky Mc with respect to interest on moneys advanced and expended under the mining, milling and construction contracts nor in renting and ultimately

selling equipment to Lucky Mc. The profits on the rental and sale of equipment and profits relating to interest on monies advanced and expended under the contracts are all included in the less than eleven per cent profit, which is a reasonable profit. The proxy statement was not false or misleading in not stating that the profits received by Utah from Lucky Mc were unreasonable.

68. Utah did not overreach in connection with its transfer of the Broadway and Nuclear royalties to Lucky Mc. That transfer was made at cost and the costs were actually incurred by Utah and properly charged to Lucky Mc under the agreement to transfer such interests at costs of acquisition. The proxy statement was not false or misleading when it did not state that Utah overreached in connection therewith.

69. The alleged fraudulent omission to reveal the receipt of the $10,000.00 commission by Robert L. Cranmer in connection with the sale of an overriding royalty interest in the Broadway claims by Intermountain Petroleum, Inc. to Utah Construction & Mining Company is not a material omission since at the most it could be reflected in each share of Lucky Mc stock by two and one-half mills. That payment is immaterial and could not have reasonably affected any decision to vote favorably or unfavorably upon the merger. Utah and its executives acted in good faith in connection with the acquisition of the Broadway royalty and there were no kickbacks or inducements paid by Utah to any of the minority shareholders of Lucky Mc. Cranmer was entitled to that payment. The alleged ommission was remote to the merger and not relevant thereto. The omission to set forth the facts concerning said commission was not relied upon by any stockholder in connection with the merger, nor could

such fact reasonably affect the judgment of any stockholders. The proxy statement was not false or misleading by failing to set forth that $10,000.00 payment.

70. The section of the proxy statement entitled "History, Business and Principal Properties of Utah" (proxy statement, pp. 7-11) is not false or misleading. It does not unduly emphasize the profitable portions of Utah's business. That section consists of a description, and some background data concerning principal properties of Utah. The combined performance of Utah and all Utah's subsidiary and affiliate companies, including all unprofitable operations, is set forth in the proxy statement. As stated in this section, the Marcona earnings are "after taxes". Marcona had paid all the taxes which its lawyers and accountants said that it owed, and at the time of the merger, when the proxy statement was sent to the Lucky Mc shareholders, the Government had asserted no deficiencies with respect to the years set forth in the proxy statement. The Government has since asserted a deficiency against Marcona and the accounting procedure which the Government asserts Marcona should have followed would have the effect of increasing, not decreasing, the earnings of Utah in the years in question. The proxy statement is not false or misleading in stating that the earnings of Marcona were after taxes.

71. A balance sheet statement for Marcona Mining Company, Cia San Juan, S. A., and San Juan Carriers, Ltd., need not have been included in the proxy statement.

72. The section in the proxy statement entitled "History, Business and Principal Properties of Utah", contains a description of Utah's Shirley Basin property and the use of the production quota derived therefrom for

processing ore through the Lucky Mc mill. The description of Utah's Shirley Basin property is not false or misleading. The acquisition of the Shirley Basin properties was not a corporate opportunity of Lucky Mc. Utah has been in the mining business since 1944 or 1945 when it began mining in Cedar City, Utah. Since then Utah has been actively prospecting for and participating in mining ventures in the Rocky Mountain basin area, throughout the United States and throughout the world, by itself and in partnership with others. Prior to Utah's first contract with Lucky Mc, Utah was engaged in a search for uranium properties throughout the Rocky Mountain area, and it had acquired uranium claims in the area of the Colorado-Wyoming border, and built a uranium mill. When Utah entered into its agreement with Lucky Mc, Utah and all the officers, directors and substantial shareholders and option holders in Lucky Mc entered into a companion agreement whereby all claims acquired within a 25-mile radius of the Lucky Mc properties should be turned over to Lucky Mc at cost. The agreement defined the area of the Lucky Mc venture and was intended to and did leave the parties thereto free to prospect for and acquire claims outside the 25-mile limit for their own use and development. Pursuant to this agreement, Utah prospected and acquired for Lucky Mc properties within the 25-mile area and located approximately two-thirds of the uranium reserves, ultimately held by Lucky Mc. Those properties were turned over to Lucky Mc at their cost to Utah. Utah continued to search for mining prospects as it had in the past. As a result of that search, Utah acquired uranium claims in the Shirley Basin of Wyoming. Those claims were over a hundred miles away from the Lucky Mc property and were a completely different kind of ore. Those properties belonged to Utah and Utah had no obligation to turn them over to Lucky Mc. The acquisi-

tion of the Shirley Basin properties was not a corporate opportunity of Lucky Mc and the proxy statement is not false or misleading in this regard.

73. The remaining sections of the proxy statement entitled, "Construction Activities and Land Development", "Description of Capital Stock of Utah and Lucky Mc", "Tax Consequences" and "Rights of Dissenting Stockholders", are not false or misleading.

74. The Internal Revenue Service assessed against Utah an additional $642,311.67 in taxes with respect to the years 1952 and 1953. Utah knew of that assessment prior to the merger. The sum of $804,815.01 was paid on July 11, 1960. The proxy statement need not have set forth the fact of that assessment and its amount. At the time of the merger, Utah had reserves for Federal taxes well in excess of that amount. That reserve was shown in the Utah balance sheet contained in the proxy statement as a liability of Utah. As such it reduced the value of Utah as compared with Lucky Mc. The proxy statement gave a conservative picture of Utah's financial position with respect to taxes and was not false or misleading with respect to the foregoing assessment of tax.

75. There was no tax detriment to Utah nor tax benefit to Lucky Mc in connection with the exercise of Utah's option to acquire 60 per cent of the Lucky Mc stock. At the time of the merger, Utah and Lucky Mc were subject to audit by the Internal Revenue Service for the years 1957, 1958 and 1959. During this period, Utah exercised its option to acquire sixty percent of the stock of Lucky Mc. In paying its taxes with respect to that transaction and its other transactions during this period, Utah acted in good faith that it was paying all the taxes

it owed with respect to the transactions which occurred during the period 1957, 1958 and 1959. The Internal Revenue Service had not asserted any deficiency with respect to those years at any time prior to the merger. Utah had substantial reserves for possible tax liabilities which were reflected in the balance sheets contained in the proxy statement as a liability and which reduced the value of Utah as compared to Lucky Mc. Those reserves were more than adequate to cover possible tax deficiencies for all years involved. The proxy statement was not false or misleading with respect to the tax consequence of Utah's exercise of the option.

76. The proxy statement does not state that an appraisal was made by persons outside Lucky Mc or Utah and in this regard was not false or misleading.

77. The Ditchburn Economic Appraisal Report of Lucky Mc was a report about Lucky Mc put out by an independent stock brokerage house in New York City to the public. Utah believed it was inaccurate and badly prepared. Mr. Littlefield sent a copy of the Report to Mr. W. H. H. Crammer on behalf of the Lucky Mc minority shareholders. The Ditchburn Report was not concealed. In failing to recite the conclusions of the Ditchburn Report, or portions thereof, the proxy statement was not false or misleading.

78. The proxy statement was not false or misleading in failing to set forth the holdings of Mr. Christensen and Mr. Littlefield in the Marcona complex or that each of them had substantial stock holdings in Utah. Mr. Christensen owned 11 per cent of the stock of the Marcona complex and Mr. Littlefield owned less than 1 per cent. Mr. Christensen and Mr. Littlefield acted in good faith,

and their holdings in Marcona, and in Utah did not cause them to commit fraud upon the Lucky Mc minority shareholders.

79. The fact that Lucky Mc and Utah stock had never been registered under Federal Securities laws was not concealed; neither Lucky Mc nor Utah was required to be so registered. The alleged omission to reveal that Lucky Mc and Utah stock had never been registered under Federal Securities Laws is not a material omission and was not relied upon by any stockholder nor could such fact reasonably affect the judgment of any stockholder. In this regard, the proxy statement is not false or misleading.

80. Following the narrative portion of the proxy statement are financial statements. On pages 16 and 17 of the proxy statement is the combined pro forma balance sheet for Utah and Lucky Mc; on pages 18 and 19, the balance sheet for Utah; and on pages 20, 21 and 22, the balance sheet for Lucky Mc. The balance sheet for Utah and for Lucky Mc and the pro forma combined balance sheet were prepared by independent certified public accountants. The balance sheets are an effort in good faith properly to present the financial picture of Utah and of Utah and Lucky Mc combined, and are not false or misleading.

81. The agreement of merger is Exhibit A to the proxy statement (proxy statement, pp. 23-29), and portions of Delaware and Nevada law applicable to Utah and Lucky Mc, respectively, dealing with the appraisal rights of shareholders are set forth as Exhibit B (proxy statement, pp. 30-31).

82. The merger ratio of ten shares of Lucky Mc stock to one share of Utah stock was fair to the Lucky Mc stockholders and to the Utah stockholders. The merger benefited the shareholders of Lucky Mc by taking them out of a speculative uranium company with a one-product industry and with an uncertain future, and by making them part of a substantial, broad-based, and diversified company whose operations in perpetuity were virtually assured and whose management was experienced in diversification. The merger benefited the shareholders of Utah by eliminating potential conflicts of interest between the two companies, increasing the amount of cash flow available to the surviving company, through savings in elimination of taxes upon intercompany dividends, and increasing efficiency in mining and construction operations.

84. Even if the material sent to all the Lucky Mc shareholders in connection with the merger were false and misleading (the court finds that such material was not false or misleading), the Lucky Mc shareholders were not damaged because the 10-to-1 merger ratio was fair and reasonable.

85. None of the plaintiffs was misled by the proxy statement nor by any of the defendants, in connection with their vote upon the merger or in any action which they took.

86. On January 29, 1960, plaintiffs, Walter G. Knauff, W. Duncan Pyle and Vern E. Lantow, voted against the merger. Prior to receiving the proxy statement they determined that in their opinion the merger was not to Lucky Mc's advantage, and accordingly voted against the merger. Mr. Knauff knew of his right to have his stock appraised, but preferred to keep his stock and

institute a lawsuit against Utah; he so informed Utah by letter. Mr. Pyle and Mr. Lantow were in accord. None sought to exercise his right of appraisal set forth in the proxy statement.

87. Plaintiffs Knauff, Pyle and Lantow were not misled by the proxy statement. Mr. Knauff, after receiving the proxy statement, did not favor the merger and made a detailed presentation in opposition to the merger based upon the material in the proxy statement. Messrs. Pyle and Lantow were friends of Mr. Knauff and discussed the merger with him.

88. On January 29, 1960, the remaining intervenors, Maude Carruth, deceased, New Park Mining Company, East Utah Mining Company, and Max J. Johnson, voted in favor of the merger. The decision of intervenors New Park and East Utah to vote favorably on the merger was not affected by any portion of the proxy statement or any representation by Utah or Allen D. Christensen or Edmund W. Littlefield. At the time of the merger, defendant W. H. H. Cranmer was the chief executive of New Park and East Utah. The Cranmers were thoroughly familiar with the factual background of Utah and Lucky Mc and the merger. In addition, the merger was discussed with the board of directors of both companies.

89. Max Johnson received his shares of Lucky Mc stock as a finder's fee for bringing the Lucky Mc properties held by McNeice, Moran and Morfeld to the attention of W. H. H. Cranmer. He was familiar with Lucky Mc from a date prior to the time Utah first had any dealings with Lucky Mc and remained familiar with the operation thereafter. In deciding to vote in favor of

the merger, Max Johnson did not rely upon the proxy statement or upon any representation made by Utah or Allen D. Christensen or Edmund W. Littlefield. He discussed the merger with stock brokers and reviewed the data with respect to Utah.

90. Maude Carruth was not connected with Lucky Mc or Utah in any way except as a shareholder. She bought her Lucky Mc stock as part of a general pattern of speculation in uranium stock. She did not investigate the financial representations in the proxy statement. In determining to vote in favor of the merger, Miss Carruth did not rely upon the proxy statement nor upon any representation made by the defendants or any of them.

91. Defendants did not breach any fiduciary duty to Lucky Mc or the stockholders of Lucky Mc in connection with the operation of Lucky Mc by Utah Construction Company after the exercise of the option granted in the agreement dated September 27, 1955.

92. Defendants did not withhold or deprive Lucky Mc or any of its stockholders of any corporate opportunity rightfully belonging to it or to them.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. In connection with the merger of Utah and Lucky Mc in January of 1960, defendants and each of them did not employ any device, scheme or artifice to defraud; did not make any untrue statement of a material fact or omit to state a material fact necessary in order to

make the statements made, in the light of the circumstances under which they were made, not misleading; and defendants and each of them did not engage in any act, practice, or course of business which operated or which would operate as a fraud or deceit, nor did they deceive any of the Lucky Mc stockholders in any material way in connection with the merger of Utah and Lucky Mc in January 1960 or otherwise.

3. All of the defendants acted in good faith in their dealings with Lucky Mc. None of the defendants engaged in any knowing fraud or deception of any of the shareholders of Lucky Mc; none knowingly concealed any material fact in connection with the merger or knowingly made any false statement of fact in connection with the merger. There was no deliberate plan to defraud the Lucky Mc minority shareholders.

4. The proxy statement dated January 5, 1960, sent by Lucky Mc and Utah to their shareholders in connection with the proposed merger of Utah and Lucky Mc did not contain any untrue statement of a material fact, and did not conceal or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

5. The omission to disclose the facts concerning the $10,000 commission which the defendant Robert L. Cranmer received in connection with the sale of a 5% overriding royalty in the Broadway claims by International Petroleum, Inc. to Utah did not constitute a violation of the Securities Exchange Act of 1934 or Rule 10 (b)-5 thereunder, since such facts are not material to the merger.

6. The defendants are not liable for any breach of fiduciary duty to Lucky Mc or any stockholder thereof, nor did the defendants withhold or deprive Lucky Mc or its stockholders of any corporate opportunity rightfully belonging to it or to them.

7. The proxy statement did not materially affect the decision of any of the plaintiffs to vote for or against the merger.

8. None of the shareholders of Lucky Mc relied to their damage on any act or omission to act by the defendants or any of them: Walter G. Knauff, Vern E. Lantow and W. Duncan Pyle did not rely on any statements contained in the merger proxy statement, rather they each voted against the merger. Accordingly they cannot represent a class of persons who allegedly relied upon said statements in voting for the merger; Maude Carruth, New Park Mining Co., East Utah Mining Co., and Max J. Johnson all voted in favor of the merger; and in doing so they did not rely on any statements or acts of the defendants or any of them, or omissions of the defendants or any of them to act.

9. The merger ratio of 10 shares of Lucky Mc stock to 1 share of Utah stock which was agreed upon in connection with the merger of Lucky Mc and Utah, was and is fair to the plaintiffs and to the stockholders of Utah and Lucky Mc.

10. The defendants did not violate any of the provisions of the Securities Exchange Act of 1934 or Rule 10(b)-5 thereunder.

11. The claims asserted by plaintiff and plaintiff-intervenors are not sustained by the evidence.

12. Plaintiff and plaintiff-intervenors are not entitled to recover in this action and no other purported member of any class is entitled to recover in this action.

13. Defendants are entitled to judgment against plaintiff and plaintiff-intervenors and for their costs of suit.

Dated at Cheyenne, Wyoming this 2nd day of October, 1967.

/s/EWING T. KERR, Judge.

Filed October 2, 1967.

FINAL JUDGMENT

[caption omitted]

This matter having come on regularly for trial before the Court on the 2nd day of May 1967, the plaintiff and the plaintiff-intervenors, Vern E. Lantow and W. Duncan Pyle, were represented by their attorneys, Edgar J. Schoen, Carl L. Lathrop of the firm of Lathrop, Lathrop & Uehner, and Harold A. Feder of the firm of Feder, Morris & Feder; Plaintiff-intervenors, Commercial Security Bank of Ogden, Utah, Adminstrator of the Estate of Maude Carruth, deceased, New Park Mining Company, East Utah Mining Company, and Max J. Johnson were represented by their attorneys, Glenn C. Hanni of the firm of Strong & Hanni, and Edward T. Lazear of the firm of Loomis, Lazear, Wilson & Pickett. The defendant Robert L. Cranmer was represented by his attorney, F. Seaton Prince of the firm of Mulliner, Prince & Mangum; the defendants Utah Construction & Mining Co., Edmund

W. Littlefield and Allen D. Christensen were represented by their attorneys, William J. Wehrli of the firm of Wehrli & Williams, John B. Bates, James F. Kirkham and Donald S. Zinn of the firm of Pillsbury, Madison & Sutro, and by Bruce T. Mitchell. And the Court having heard the evidence took the matter under advisement; and having considered the written briefs submitted by all parties, and having made and filed its Findings of Fact and Conclusions of Law, and being fully advised in the premises, IT IS

ORDERED that plaintiff and plaintiff-intervenors take nothing by their complaints, that they go hence without day, and that the defendants have their costs and expenses herein disbursed.

Dated at Cheyenne, Wyoming, this 2nd day of October, 1967.

/s/ EWING T. KERR, Judge.

Appendix C

Extracts,
Merger Proxy Statement

LUCKY Mc URANIUM CORPORATION

RIVERTON, WYOMING

January 5, 1960

To the Stockholders of
LUCKY Mc URANIUM CORPORATION:

The following notice of meeting and proxy statement refers to an agreement for the merger of Lucky Mc Uranium Corporation into Utah Construction & Mining Co. The agreement has been approved by the directors of each company, subject to adoption by the stockholders. The proposal will be submitted to the Lucky Mc stockholders at a special meeting to be held on January 29, 1960, as set forth in the notice.

The merger agreement provides for the exchange of ten shares of Lucky Mc capital stock for one share of Utah. Shares of Lucky Mc owned by Utah will be cancelled.

The merger agreement is printed in full as an exhibit to the proxy statement. The proxy statement describes pertinent provisions of the agreement and supplies financial statements and other information concerning Lucky Mc and Utah which have a bearing on the proposed merger. You are urged to consider this information carefully.

The Board of Directors considers the merger advisable for the following reasons:

A. Lucky Mc at present is engaged solely in the extraction and processing of uranium ores, producing

uranium oxide which is sold only to A.E.C. under a contract which expires in 1966. The merger will enable Lucky Mc stockholders to convert their investment into a diversified mining, construction and land development company having an indicated continuity of operations.

B. In past practice it has been found desirable and expedient for Lucky Mc, in lieu of recuriting a full technical staff, to contract, as required, for the services of Utah's experienced technical personnel specializing in various mining activities including uranium mining and in construction operations in the mining field. Some duplication in costs of operations and administration in this connection will be eliminated by merging Utah and Lucky Mc, and greater efficiency will result when other services now performed for Lucky Mc by Utah and its subsidiaries can be performed directly rather than by contract.

C. Utah or its wholly owned subsidiaries also have extensive uranium properties and interests other than those controlled and operated by Lucky Mc. The merger will effect an orderly consolidation of the uranium operations of the several companies and facilitate the expansion and development of their ore reserves; and it will also enable the surviving company, by reason of the merger, to enlarge and improve its productive capacity through the construction, financing or operation of additional plant or facilities to meet future uranium market conditions as they may develop.

The directors unanimously recommend that you vote in favor of the merger and that you attend the meeting in person or, if you cannot, that you promptly sign and mail your proxy.

ROBERT L. CRANMER, Secretary

Notice of Special Meeting of Stockholders
To Be Held January 29, 1960

To the Stockholders:

NOTICE IS HEREBY GIVEN that a special meeting of the stockholders of the LUCKY MC URANIUM CORPORATION, a Nevada corporation, will be held at the President's Suite, Newhouse Hotel, Fourth South and Main Street, in the City of Salt Lake, County of Salt Lake, State of Utah, on Friday, January 29, 1960, at 3:00 o'clock in the afternoon for the following purposes:

1. To consider and vote upon the adoption of the Agreement of Merger providing for the merger of Lucky Mc Uranium Corporation with and into Utah Construction & Mining Co., the surviving corporation, and to authorize the directors and officers of Lucky Mc Uranium Corporation to take any further action necessary or desirable to make the merger effective;

2. To elect Inspectors of Election; and

3. To transact such other business as may properly come before the meeting and any adjournment or adjournments thereof.

The stock transfer books of the company will not close, but a record of stockholders will be taken as of the close of business on December 28, 1959, and only those stockholders of record at such date will be entitled to notice of, and to vote at, such meeting, or any adjournment thereof.

Stockholders who do not expect to attend the meeting are urged to sign, date, and return promptly the enclosed proxy.

By Order of the Board of Directors,

ROBERT L. CRANMER, Secretary

* * * *

ACTION TO BE TAKEN AT THE MEETING

The purpose of the special meeting is to consider and to vote upon a proposal for the merger of Lucky Mc into Utah Construction & Mining Co. (hereinafter called "Utah"), which will continue as the surviving corporation, upon the basis of ten shares of the capital stock of Lucky Mc for one share of the capital stock of Utah.

* * * *

In view of the nature of the transaction, members of the Board of Directors of Lucky Mc who are also members of the Board of Directors of Utah have abstained from voting as directors of Lucky Mc on the Agreement of Merger. Of the six remaining directors, one is an officer and stockholder of Utah and another is an employee and stockholder of Utah. The directors believe that the proposed merger is desirable, and that the terms thereof are fair and equitable, and recommend approval of the merger by the stockholders of Lucky Mc.

PLAN OF MERGER

Utah is incorporated under the laws of Delaware. Lucky Mc is incorporated under the laws of Nevada. When the merger becomes effective the separate existence of Lucky Mc will cease and Utah will succeed to all the rights and properties, and be subject to all of the debts, liabilities and duties of Lucky Mc.

Basis of Merger.

Utah has one class of authorized stock, namely, its capital stock ($2 par value) of which 10,000,000 shares are authorized, and 1,787,325 shares were outstanding on December 31, 1959.

Lucky Mc has one class of authorized stock, namely, its capital stock (10c par value), of which 10,000,000 shares are authorized and 6,064,080 shares were outstanding on December 31, 1959. Utah is the owner and holder

of 3,638,748 shares of the issued and outstanding capital stock of Lucky Mc, comprising 60% of the outstanding stock.

The Agreement of Merger provides, in substance, that:

(a) The shares of capital stock of Utah outstanding before the merger shall remain outstanding and unchanged;

(b) Each outstanding share of Lucky Mc (exclusive of shares owned by Utah) shall be converted into one tenth of one share of the capital stock of Utah; and

(c) Each share of the capital stock of Lucky Mc owned by Utah shall be cancelled and no stock of Utah shall be issued in respect thereof.

The basis for the exchange of shares of Utah for shares of Lucky Mc was negotiated by the management of Utah and principal stockholders of Lucky Mc, none of whom are affiliated with Utah. The rate of exchange was determined by arm's length bargaining between such groups, and took into consideration the relative market values, earnings, book values, dividend history, prospects and other factors applicable to the shares of Utah and Lucky Mc.

No fractional shares of Utah stock will be issued, but pursuant to the Agreement of Merger, arrangements will be made with an exchange agent whereby any holder of Lucky Mc stock otherwise entitled to a fractional share of capital stock of Utah will have the option for a limited period either to purchase and additional fractional share sufficient to make up one full share or to sell his fractional share for cash.

All costs in connection with the issuance of shares and the fees of the exchange agent will be borne by the company.

* * * *

Abandonment of the Merger.

The Agreement of Merger provides that the merger shall be abandoned if, either in the case of Utah or Lucky Mc, the number of shares represented by stockholders who dissent to the merger shall equal ten percent or more of the outstanding shares of the company.

* * * *

Earnings.

The following tabulation presents:

(1) A summary of the results of operations of Utah Construction & Mining Co. for the five years ended October 31, 1959. This summary has been examined by Arthur Andersen & Co., independent public accountants, as set forth in the opinion of that firm included in this Proxy Statement.

(2) A summary of the net income of Utah Construction & Mining Co. and the equity of Utah in the undistributed earnings (unaudited) of subsidiary and affiliated companies net of the estimated income taxes payable on such earnings when distributed for the five years ended October 31, 1959.

(3) A summary of the results of operations of Lucky Mc Uranium Corporation for the three years ended October 31, 1959. Mining operations of Lucky Mc commenced February 28, 1958. This summary has been examined by Ernst & Ernst, independent public acountants, as set forth in the opinion of that firm included in this Proxy Statement.

(4) A summary of the pro forma combined results (unaudited) of operations of the two companies, prepared by combining the amounts presented in summaries (1) and (3).

	1955	1956	1957	1958	1959
	(000 omitted)				
(1) *Utah Construction & Mining Co.*:					
Gross revenue from operations	$19,818	$29,741	$28,194	$32,581	$30,016
Other income	1,789	2,450	2,469	5,147	3,811
Costs and expenses	(19,419)	(25,418)	(27,531)	(34,720)	(28,889)
Provision for Federal income taxes	(450)	(350)	(400)	(1,100)	(600)
Net income[2]	$ 1,738	$ 2,423	$ 2,732	$ 1,908	$ 4,338
Net income per share[1]	$.99	$1.38	$1.53	$1.07	$2.43
(2) *Utah Construction & Mining Co. and Subsidiary and Affiliated Companies (Unaudited)*:					
Net income of Utah Construction & Mining Co. as above	$ 1,738	$ 2,423	$ 2,732	$ 1,908	$ 4,338
Utah's equity in undistributed earnings of subsidiary and affiliated companies	710	1,756	2,689	1,412	2,853
Combined net income	$ 2,448	$ 4,179	$ 5,421	$ 3,320	$ 7,191
Amount per share[1]	$1.39	$2.38	$3.04	$1.86	$4.02

	1955	1956	1957	1958	1959
			(000 omitted)		
(3) *Lucky Mc Uranium Corporation:*					
Gross sales			$ —	$10,240	$14,222
Costs and expenses			—	(6,765)	(9,473)
Provision for Federal income taxes			—	(500)	(800)
Net income			$ —	$ 2,975	$ 3,949
Net income per share[1]			$ —	$.49	$.65
(4) *Pro Forma Combined (Unaudited):*[2]					
Gross sales and revenues	$19,818	$29,741	$28,194	$42,820	$44,238
Other income	1,789	2,450	2,469	5,147	3,222
Costs and expenses	(19,419)	(29,418)	(27,531)	(41,396)	(38,018)
Provision for Federal income taxes	(450)	(350)	(400)	(1,600)	(1,812)
Net income	$ 1,738	$ 2,423	$ 2,732	$ 4,971	$ 7,630
Net income per share[1] [4]	$.87	$1.21	$1.35	$2.46	$3.76

[1] Based on the number of shares outstanding at the end of each period and adjusted in the case of Utah to effect retroactively the 2 for 1 stock split in the form of a 100% stock dividend occuring in 1957.

[2] Reflects elimination of profit on intercompany sales and other adjustments.

[3] Net income in 1959 includes a reduction of $700,000 in Federal income taxes as a result of joint venture losses recorded in prior years but not reported for tax purposes until the current year.

[4] Giving effect to issuance of additional shares of capital stock pursuant to the Agreement of Merger.

HISTORY, BUSINESS AND PROPERTIES OF LUCKY Mc

Lucky Mc Uranium Corporation was incorporated under the laws of the State of Nevada, June 8, 1954. Lucky Mc is engaged in the mining and milling of uranium ores in the Gas Hills Area, Fremont County, Wyoming. The concentrate produced, uranium oxide, is sold entirely to the U.S. Atomic Energy Commission under a sales contract which is effective through 1966.

The first mining on the properties was commenced in the spring of 1954 with the first shipment of ore delivered to the Salt Lake City mill of the Vitro Uranium Company on July 1, 1954. Total commercial production from the mine from its beginning to July, 1956, amounted to 23,411.89 wet tons. The proceeds from the sale of this ore were reinvested for the purposes of exploration, development, patent proceedings, metallurgical testing, mill design, buildings and equipment.

Due to the necessity for capital funds and technical assistance, a contract was negotiated by Lucky Mc with Utah in September of 1955, which was approved by the stockholders of Lucky Mc and contained the following major provisions obligating Utah to:

1. Conduct a further exploration program, with the expenditure of not less than $300,000 for the purpose of checking the results obtained by Lucky Mc and to expand the reserve estimate, if possible.

2. Enter into active negotiations with the Atomic Energy Commission on a milling contract.

3. Construct, if a contract with the Atomic Energy

Commission were consummated, a uranium ore treatment plant and related facilities.

4. Provide or arrange the necessary financing for the project.

5. Carry out, under its active management and control, all mining and processing activities after the mill was constructed.

Utah acquired an option to buy an amount of stock from Lucky Mc which would bring Utah's holdings to 60% of the outstanding stock. This option was exercised in February, 1957.

The initial phase of the arrangement was under an option agreement until drilling operations could prove reserves sufficient to make a mill feasible, during which time Utah had limited management responsibility for the property.

In accordance with its obligation, Utah personnel began work at the mine September 27, 1955, under a six months' option. Exploration was commenced immediately and carried on energetically throughout the option period, at the end of which time a six month's extension was requested and granted. The program accomplished its purpose and negotiations with the Atomic Energy Commission were commenced in March, 1956.

On November 14, 1956, Lucky Mc entered into a contract with the U.S. Atomic Energy Commission for the construction and operation by Lucky Mc of a uranium ore processing plant having a capacity of 750 tons daily, and for the sale to the Commission of 5,600,000 pounds of uranium oxide during the period ending March 31, 1962.

The contract was cancelled June 30, 1959, after delivery of 2,183,220 pounds of uranium oxide. This cancellation resulted after the company had negotiated another sales contract with the U.S. Atomic Energy Commission, dated May 1, 1959, which provides for the delivery of a maximum of 1,692,245 pounds of uranium oxide annually from July 1, 1959, through March 31, 1962, and a maximum of 1,775,320 pounds of uranium oxide annually thereafter through December 31, 1966.

MARCONA MINING COMPANY (MARCONA).

Utah owns a 41.25% interest in the equity stock and a 50% interest in the voting stock of Marcona, which corporation is engaged in mining, by open-pit method, the Marcona iron ore deposit in the Republic of Peru.

Marcona's mining rights and related obligations are derived from concessions granted by or for the Peruvian Government by a governmental agency, and cover approximately 600,000 acres. Such concession continues until 1982, and may be extended by agreement. Marcona's proven reserves of ore, at June 30, 1959, as estimated by its staff engineers were in excess of 125 million tons, all of which is usable as direct shipping ore, or can be processed to produce a merchantable concentrate. These reserves, in general, have an iron content averaging better than 55 per cent.

The property has not yet been fully explored and Marcona believes that further exploration and development work will establish the existence of additional reserves. The reserves other than the direct shipping ore will require some upgrading by beneficiation to be rendered marketable.

In 1958 Marcona initiated a program for the installation of beneficiation facilities, including the installation of new port facilities and new facilities for the transportation of ore from mine to port. Appropriations of $21,900,000 have been authorized for the approved phases of this program, to be completed in about 18 months after construction is started, and to finance the program approximately $12,000,000 will be obtained through long term loans. Facilities involving substantial additional expenditures will be required in order to render the total reserves marketable.

The agreement with the Peruvian government agency provides for certain substantial preferences, both as to deliveries and as to price, in favor of such agency (which operates a government-owned steel mill) and other Peruvian customers, and contains certain restrictions on export.

Except only for sales of approximately 175,000 tons of ore sold annually to agencies of the Peruvian and Argentine governments, Marcona sells its entire production of ore to an affiliated company, Cia. San Juan, S.A. (owned 41.25 per cent by Utah) which performs the functions of marketing and shipping the ore. The following table shows Marcona's earnings after taxes and the total dividends paid by it in each year since the commencement of its operations in 1953 and for the first ten months of 1959:

YEAR	EARNINGS	DIVIDENDS
1953	$1,652,178	—
1954	3,106,598	$ 357,116
1955	715,426	851,766
1956	3,625,308	1,243,001
1957	7,525,362	4,332,644
1958	4,203,065	2,140,099
1959 (10 months)	2,567,149	1,070,100